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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of

Federal-State Joint Board on
Universal Service

CC Docket No. 96-45

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, offers the following comments on various Petitions for Reconsideration of the Report and Order in the Commission's Universal Service Proceeding:

- TRA continues to support the recovery of universal service contributions predicated upon gross revenues net of payments to other carriers. To the extent universal service contributions are predicated upon end user telecommunications revenues, however, TRA strongly supports the recovery of such contributions through an explicit end user surcharge.
- TRA supports the Commission's determination that the public interest would be served by allowing carriers to modify tariff-based long-term service arrangements in order to pass through universal service fund assessments to end users.
- TRA opposes any further restriction of the universe of carriers which are eligible to receive universal support funding pursuant to the criteria set forth in the Report and Order.
- TRA urges the Commission to continue the obligation of carriers to provide toll blocking services in support of universal service goals.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits its comments on various Petitions for Reconsideration of the Report and Order² filed in the above-captioned matter. Specifically, TRA responds herein to the Petitions for Reconsideration filed by AT&T Corp. ("AT&T"), MCI Telecommunications Corporation. ("MCI"); U S West, Inc. ("U S West"); Ad Hoc Telecommunications Users Committee ("Ad Hoc"); the American Petroleum Institute ("API"); Sprint Corporation ("Sprint"), Time Warner Communications Holdings, Inc. ("Time Warner"), the Rural Telephone Coalition; and GVNW, Inc. As set forth below, TRA urges the Commission, to the extent universal service contributions

¹ A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or soon will be, offering local exchange and/or exchange access service.

² In the Matter of Federal-State Joint Board on Universal Service ("Report and Order"), CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("Report and Order").

continue to be predicated upon end user telecommunications revenues, to require recovery of such contributions through an explicit end user surcharge, and to reaffirm its authority to permit the modification of tariff-based long term service arrangements in order to allow for the pass-through of such universal service fund ("USF") assessments to end users. TRA also urges the Commission to refrain from further limiting the universe of carriers eligible to receive universal support and to retain the obligation of carriers to provide toll blocking services in support of universal service goals.

ARGUMENT

A. To the Extent the Commission Adheres to its Decision to Predicate Universal Service Obligations Upon End User Telecommunications Revenues, Recovery Should Be Accomplished through a Mandatory, Explicit End User Surcharge.

In its comments in this proceeding, TRA has consistently urged, and the Joint Board has also recommended, that fulfillment of the mandate of Section 254(d) that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service,"³ would best be accomplished by predating carrier contributions upon "gross telecommunications revenues net of payments to other carriers."⁴ The Joint Board recommended this approach in large measure because "basing contributions on gross revenues net of payments to other carriers

³ 47 C.F.R. § 254(d).

⁴ In the Matter of Federal-State Joint Board on Universal Service ("Recommended Decision"), 12 FCC Rcd. 87, ¶ 807 (1996) ("Recommended Decision").

eliminates the 'double payment' problem"⁵ and equitably allocates the universal service funding burden by distributing the obligation among all carriers.

The Commission ultimately determined to base universal service contributions upon end user telecommunications revenues, an approach which, like the Joint Board's suggested methodology, avoids double recovery. Unlike the Joint Board's recommendation, however, the assessment mechanism set forth in the Report and Order lacks the added advantage of distributing the funding burden over the widest possible range of telecommunications carriers. Indeed, by relieving wholesale and exchange access providers of all obligations to contribute to universal service support, the Report and Order imposes upon retail service providers the entire universal service funding obligation. This ensures that the carriers at the end of the distribution chain, including the smallest providers, i.e., resale carriers, will always bear the financial brunt of the funding obligation. A recovery mechanism based upon gross revenues net of payments to other carriers, on the other hand, would involve intermediate providers in the funding process and thus allow the operation of market forces to potentially ameliorate the impact of the funding burden on any particular subset of carriers. By predicated USF contributions upon end user revenues, the Report and Order inadvertently places the full financial burden solely upon the entities which, in many instances, will be least likely to economically contend with that burden. Inasmuch as this funding mechanism simultaneously absolves intermediate carriers from all contribution obligations, it produces a result arguably at odds with the directive of Section 254(d) that "every telecommunications carrier that provides interstate telecommunications services shall contribute" to the preservation and advancement of universal service.⁶

⁵ Id.

⁶ 47 C.F.R. § 254(d).

TRA continues to support adoption of the Joint Board's recommendation that USF contributions be based on gross revenues net of payments to other carriers because such an approach most equitably distributes the funding burden, avoids the double assessment dilemma, and, as the Joint Board has noted, is easy to administer.⁷ To the extent such a recovery mechanism remains unavailable, TRA supports those commenters which urge the Commission to mandate the use of an explicit end user surcharge on all interstate retail telecommunications revenues as the recovery mechanism for universal service support.⁸

TRA agrees with MCI that identifying an explicit USF surcharge as such in carrier bills to end users is a reasonable and appropriate means of informing end users of the specific costs being recovered to fund federal universal service programs and should be affirmatively sanctioned by the Commission.⁹ Under the Report and Order, retail telecommunications carriers must absorb the full impact of consumer criticism for what will, absent an explicit surcharge, outwardly appear to be a straightforward rate increase. Allowing such carriers to make clear that the increased cost results from a governmentally imposed obligation will at least mitigate the potential damage to customer relations. Identifying the USF contribution as an explicit charge, imposed upon all end users in order to fund universal services to all consumers, will thus partially ameliorate the competitive impact of such a restricted contribution mechanism by educating end users that all retail service providers are compelled to collect and remit the end user's USF contribution.

⁷ Id.

⁸ Petition for Reconsideration of AT&T at 2; Petition for Reconsideration and Clarification of MCI at 11.

⁹ Petition for Reconsideration of MCI at 12.

The Commission has properly recognized that all consumers should assist in ensuring the broad availability of universal service. TRA strongly disagrees with the position taken by the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), which in essence seeks insulation of large corporate telecommunications users from the USF funding obligations which all other end users will incur pursuant to the Report and Order. Urging the Commission to effectively sanction a new form of "corporate welfare", Ad Hoc argues that the Commission should "recant its statement in Paragraph 851 of the R & O that carriers may unilaterally abrogate customer contracts to raise the rates provided for in those contracts to reflect the carriers' newly required contributions to universal service support mechanisms . . ."¹⁰

As an initial matter, Ad Hoc greatly overstates the intended scope and effect of Paragraph 851. Even a casual reading reveals the Commission has neither authorized nor encouraged the wholesale abrogation of long-term service commitments envisioned by Ad Hoc. The Commission simply allows a modification of an existing contract in furtherance of clearly identified public interest goals. After first providing that "carriers are permitted to pass through their contribution requirements to all of their customers of interstate services in an equitable and nondiscriminatory fashion,"¹¹ the Commission further clarifies that universal service contributions may be passed through to all consumers, including those taking service under extended term contracts, specifically holding that "we find that universal service contributions constitute a sufficient public interest rationale to justify contract adjustments."¹²

¹⁰ Petition for Reconsideration of Ad Hoc at 1.

¹¹ Report and Order, FCC 97-157, at ¶ 851.

¹² Id.

Arguing that the Commission erred in authorizing carriers to pass through the universal service assessment by modifying contractual arrangements, Ad Hoc appears to suggest that the Commission does not have the authority to make the public interest determination that such modifications are warranted. To the contrary, the Commission has recognized, and has appropriately invoked its authority, where it has found it in the public interest to do so, to direct carriers to modify contractual arrangements. This authority has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit which has confirmed that "the Commission has the power . . . to modify [] provisions of private contracts when necessary to serve the public interest."¹³

For example, after determining that the public interest was best served by fostering a freely competitive market for 800 services, the Commission modified certain provisions contained in long-term service arrangements to the extent necessary to permit a "fresh look" period after the ability to port 800 numbers had become technologically available during which such contracts could be terminated without enforcement of those provisions.¹⁴ Likewise, to facilitate the development of access competition, which the Commission similarly deemed to be in the public interest, the Commission modified, without altogether eliminating, certain contractual provisions and provided a similar "fresh look" period "designed to eliminate unreasonable barriers to competition without unduly interfering with business arrangements between LECs and their customers."¹⁵ In both proceedings, Ad Hoc was an ardent champion

¹³ See Western Union Telegraph Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (*citing United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)).

¹⁴ In the Matter of Competition in the Interstate Interexchange Marketplace, ("Memorandum Opinion and Order on Reconsideration"), FCC 92-181, 7 FCC Rcd. 2677 (1992).

¹⁵ In the Matter of Expanded Interconnection with Local Telephone Company Facilities, ("Second Memorandum Opinion and Order on Reconsideration"), FCC 93-378, 8 FCC Rcd. 7341, ¶ 13 (1993).

of the abrogation of contract terms which it here vehemently opposes.¹⁶ Indeed, in the latter case, Ad Hoc minimized the significance of the Commission's action, suggesting offhandedly that it was "merely a refusal to enforce contractual penalties."¹⁷

Further, the reliance of Ad Hoc and the American Petroleum Institute upon factors pertinent to the substantial cause test -- unforeseen circumstances and protection of business expectations -- is misplaced here.¹⁸ The substantial cause test essentially holds that a carrier's statutory right to affect unilateral changes in tariffed long-term service arrangements is generally limited only by the reasonableness of those changes, except when the Commission finds that under the particular circumstances altering the terms of a long-standing commitment would be contrary to the public interest.¹⁹ The Commission has specifically determined that allowing the pass-through of universal service contributions would benefit the public interest. Accordingly,

¹⁶ Memorandum Opinion and Order on Reconsideration, FCC 92-181, at ¶ 15; Second Memorandum Opinion and Order on Reconsideration, FCC 93-378, at ¶ 15.

¹⁷ Second Memorandum Opinion and Order on Reconsideration, FCC 93-378, at ¶ 15.

¹⁸ Petition for Reconsideration of Ad Hoc at 6; Limited Petition for Reconsideration of API at 4. Ad Hoc's assertion that the Commission's action was foreseeable adds little to its argument. Industry debate concerning the appropriate means of implementing a universal service funding mechanism remained heated and contested throughout the course of this proceeding. Indeed, the manner of USF assessment, which differed from that set forth in the Recommended Decision, was not revealed until the release of the Report and Order on May 8, 1997. The only thing that was foreseeable before that date was that at some point the Commission's universal service programs would be significantly restructured. The ultimate details of that restructuring could not reasonably have been foreseen.

¹⁹ In the Matter of RCA Americom Communications, Inc. ("Memorandum Opinion and Order"), 86 F.C.C.2d, 1201, ¶ 12 (1981).

to the extent Ad Hoc relies upon the substantial cause test, application of that test under these circumstances would lead to the opposite result of that urged by Ad Hoc.²⁰

B. The Commission Should Not Further Limit the Universe of Carriers Eligible to Receive Universal Service Support.

In the Report and Order, the Commission determined that "a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) and that meet the definition of facilities set forth above [i.e., physical components of the telecommunications network], satisfies the facilities requirement of section 214(e)(1)(A)."²¹ Sprint, Time Warner and the Rural Telephone Coalition urge the Commission to reconsider this holding and to instead include among those carriers eligible to receive universal service support only those carriers which provide service through their own, or a combination of their own and other providers' facilities.²² U S West goes further and argues that only carriers which own loop facilities should be entitled to receive universal service support.²³

TRA strongly urges the Commission to refrain from further restricting the category of carriers eligible to receive universal service support. The Commission has squarely addressed the eligibility issue, specifically recognizing that carriers providing supported universal services

²⁰ TRA notes that despite its lengthy dissertation on principles of state contract law, Ad Hoc misses a fundamental point, notably that inasmuch as the long-term service arrangements its members have entered into are permutations of the filed tariffs of their underlying service providers, contract law principles do not control here. Pursuant to Maislin Industries, U.S. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990), the supremacy of a carrier's tariff over privately contracted arrangements remains indisputable.

²¹ Report and Order, FCC 97-157, at ¶ 154.

²² Petition for Reconsideration of Sprint at 4; Petition for Reconsideration of Time Warner at 3; Petition for Reconsideration and Clarification of the Rural Telephone Coalition at 13-16.

²³ Petition for Reconsideration and Clarification of U S West at 16.

through unbundled elements satisfying the Commission's definition of "facilities". To hold otherwise, the Commission reasoned, would directly contravene the intention of Congress that entry into the local services market may be accomplished through the purchase of unbundled network elements since such new entrants -- alone among all local service providers -- would benefit neither directly nor indirectly from universal service support.²⁴

In setting forth the criteria for qualifying as an eligible carrier pursuant to Section 214(e)(1)(A), the Commission has adopted a definition of "facilities" much more restrictive in scope than that which has been urged by various segments of the telecommunications industry. TRA submits that any further restriction in the universe of carriers eligible to receive universal service support will likely lead to precisely the negative consequences which the Commission believes Congress intended to avoid, namely, the serious curtailment of opportunities to enter the local market through purchase of unbundled network elements and the accompanying restraint upon the development of local exchange competition.²⁵ Having both fully considered the serious consequences which would flow from more restrictive eligibility criteria and acted to avoid those consequences, the Commission should not now modify its conclusion as requested by petitioners.

²⁴ Report and Order, FCC 97-157, at ¶¶ 164-166.

²⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 329 (1996), *motion for stay denied*, 11 FCC Rcd. 11754, *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19734 (1996), *further recon. pending, vacated in part sub nom. Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.*, (8th Cir. July 18, 1997).*

C. The Availability of Toll-Limitation Features Must Be Maintained.

TRA opposes the request of GVNW, Inc., that the Commission reconsider the requirement that toll limitation services must be provided low-income consumers because "it is not technically or administratively feasible to provide this service."²⁶ At the outset, TRA notes that the Report and Order requires merely that "to the extent carriers are capable of providing them, toll-limitation services should be supported only for low-income consumers at this time."²⁷ While some carriers may not currently possess the capability to provide toll-limitation services, numerous others "are capable of providing 'toll blocking'."²⁸

The Commission has identified disconnection for non-payment of toll charges, coupled with the high deposits carriers routinely charge for initiation of telephone service, as a potentially more significant barrier to the goal of ensuring universal access to telephone service than the cost of local service itself.²⁹ The Commission has further identified the availability of toll limiting service, which would have the additional benefit of allowing carriers to reduce essential deposits, as a significant factor toward increasing the ability of low-income consumers to maintain affordable access "to any public telecommunications services."³⁰ In light of the importance of toll-limitation services in assisting consumers to maintain telephone service, TRA

²⁶ Petition for Reconsideration of GVNW, Inc. at 19.

²⁷ Report and Order, FCC 97-157, at ¶ 389.

²⁸ See Petition for Reconsideration and Clarification of U S West at 21.

²⁹ Report and Order, FCC 97-157, at ¶¶ 28, 83.

³⁰ Federal-State Joint Board on Universal Service ("Notice of Proposed Rulemaking and Order Establishing Joint Board"), CC Docket No. 96-45, FCC 96-93 ¶ 56 (released March 8, 1996), citing the FCC's Subscriber Notice at 13005-06.

submits that all carriers capable of providing such services should be under a continuing obligation to do so.

II.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission (i) to require recovery through an explicit end user surcharge in the event a universal service support recovery mechanism predicated upon end user revenues rather than gross telecommunications revenues net of payments to other carriers is retained; (ii) to reaffirm the Commission's authority to allow the modification of tariff-based long-term service arrangements based upon its determination that the overarching importance of universal service goals makes such modification in the public interest; (iii) to refrain from further restricting eligibility criteria for the receipt of universal service support; and (iv) to maintain the Report and Order's commitment to requiring the offering of toll blocking services.

Respectfully submitted,

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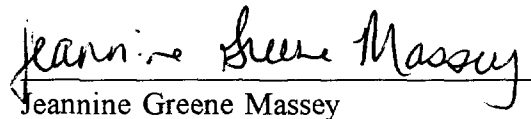
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